IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE L. BOCK, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

EDWIN L. WEISL, JR.,
Assistant Attorney General.

FRANK R. FREEMAN,
United States Attorney,
Yakima, Washington, 98901.

RONALD R. HULL,
Assistant United States Attorney,
Yakima, Washington, 98901.

ROGER P. MARQUIS,
ROBERT M. PERRY,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

CITATIONS

ases:

Cases cont'd:

Statutes:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20114

GEORGE L. BOCK, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal filed February 23, 1965 (1 R. 111),[1/] m a judgment on verdict (1 R. 104-109) filed on January 12, 5, awarding just compensation for the property condemned by United States in the total amount of $3,652. The jurisdic- n of the district court was invoked by the United States er 28 U.S.C. sec. 1358 (1 R. 1-5). The jurisdiction of this rt is invoked under 28 U.S.C. sec. 1291.

1/ The record is in two volumes, Volume 1 containing the pleadings and Volume 2 the transcript of the testimony. y will be referred to herein as "1 R." and "2 R."

QUESTIONS PRESENTED

1. Whether the jury was properly instructed regarding the enhancement in value created by the government project.

2. Whether the district court properly refused a requested instruction regarding the application of a state statute.

3. Whether the landowner is entitled to compensation, under the guise of severance damage, for business losses because of the change of highway access.

STATEMENT

On June 20, 1962, the United States instituted proceedings to condemn certain parcels of land which belonged to appellant for construction and improvement of Washington State Highway Project UI-82-2 (5), a portion of the National System of Interstate and Defense Highways, being constructed in accordance with standards, including control of access, adopted by the Secretary of Commerce, Bureau of Public Roads (1 R. 6), in cooperation with the State Highway Departments

(1 R. 1-12).[2/] A Pre-Trial Order, dated November 20, 1964, sets out the agreed facts of this case (1 R. 42-43). Appellant's land is located just outside the southeast city limits of Yakima. The tract is almost rectangular in shape, consisting of a total of 2.77 acres. The north boundary of the land extends approximately 420 feet abutting Secondary State Highway 11-A, which constitutes an extension of East Lenox Avenue (2 R. 36-37, 48-50). A diagram shows the land's relation to the new freeway.

2/ The Secretary of Commerce is authorized to acquire land, including the control of access for the federal-state highway project in question, under the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; the Act of February 26, 1931, 46 Stat 1421, 40 U.S.C. secs. 258(a) to (e); and Section 109 of the Federal-Aid Highway Act of 1956, 70 Stat. 374, as codified August 27, 1958, 72 Stat. 893, 23 U.S.C. sec. 107.

N
W
E
S
Exit Freeway
Enters Freeway
Freeway
11-A
Secondary State Highway 11-A (East Le
New Access
Old access
Parcel B
Parcel C
Old driveway
2.36 acres
Bock
Parcel A
0.22 acre
Enters Freeway
Freeway (U.S. Highway 82)
Exit Freeway

Several old frame buildings are located on the property and appellant lives in one of the buildings, which is also utilized for storage (2 R. 49-50). Appellant used most of the land for truck gardening and operated a retail vegetable business on the premises (2 R. 49, 52, 181).

Before the government taking, appellant's driveway entered the Old Highway 11-A with a right-of-way access approximately 30 feet wide. Although appellant had a right of access to the Old Highway 11-A from any point of his property, the 30-foot-wide access was the only right of way granted by the State Highway Department. The remainder of the abutting land was five or six feet below the surface of the Old Highway 11-A (2 R. 21-22, 29, 40-41, 106-107).

The project basically is that of a freeway comprising a portion of U.S. Highway 82 which affords a bypass east of the city, running in a north and south direction. The other portion of the project involves Secondary State Highway 11-A which runs in an east and west direction and intersects, by way of an overpass, U.S. Highway 82.

Appellant's land is located in the vicinity of this intersection and the project required a curving access road to cross the northwest corner of appellant's tract, affording access between Secondary State Highway 11-A and U.S. Highway 82, a common point of access for all traffic. Therefore, Secondary State Highway 11-A was improved into a limited access highway becoming a part of the cross-state pattern (2 R. 10-14, 29-30; Ex. No. 4). Consequently, appellant's original 30-foot-wide access driveway into Old Highway 11-A was closed and the Highway Department constructed for appellant an access road extending the old driveway along the north boundary of his tract into the curving portion of the access road located in the northwest corne thereof, which afforded appellant with a 42-foot-wide access abuting Secondary State Highway 11-A. A vehicle coming off Secondary State Highway 11-A may enter appellant's land from either direction (2 R. 23-26; Ex. No. 3).

The declaration of taking was filed on June 20, 1962 (1 R. 7-12), and consisted therefore of three parcels as follows

Parcel A: consisting of 0.22 of an acre in fee; the triangular area within the northwest corner of appellant's land upon which has been located the curved portion of the highway access road abutting Secondary State Highway 11-A.

Parcel B: consisting of 0.19 of an acre upon which a temporary easement was acquired up to a three-year period for use in connection with the project construction and upon which a permanent access road was constructed along appellant's north boundary for his use and maintenance affording access to Parcel A, thence to Secondary State Highway 11-A.

Parcel C: consisting of an easement of the balance of the appellant's ownership, a 2.36-acre remainder from the original 2.77-acre tract. Acquisition includes all existing statutory abutters' rights or easements for access to Secondary State Highway 11-A, excepting the opening across Parcel B into Parcel A.

On November 20, 1964, a jury trial was held to determine just compensation for the tract, commencing with a view of the premises (1 R. 37; 2 R. 210).

The Government called two expert appraisal witnesses to testify as to the market value of appellant's tract. The first, Warren Echles, District Senior Appraiser, Department of

Highways (2 R. 43), valued appellant's whole tract before the taking at $5,155, and after the taking at $3,311, concluding that the fair market value of the parcels taken was $1,844. He arrived at this value by utilizing comparable sales in the vicinity (2 R. 59-74, 87). He further testified that the highest and best use of the tract was the existing use (truck gardening and roadside market), along with some limited type commercial operation (2 R. 55). He further said that the taking, including the restriction of access, did not materially change such use (2 R. 57-58).

The other government appraisal witness, Ben Lombard, a licensed appraiser and member of a private real estate agency, also testified that the highest and best use of the property had not changed as a result of the taking (2 R. 105, 131). He valued the entire property before the taking at $4,878, and after valued at $3,492, arriving at the fair market value of the parcels taken at $1,386 (2 R. 114 and 115). He also based his value on comparable sales (2 R. 116-122).

Appellant's first witness, Marion L. Pierce, a realtor (2 R. 136), testified he used the comparable sales approach in arriving at his values (2 R. 141-142, 148-180). He gave a before value of $23,500 and determined the after value at $3,000 (2 R. 157). The Government presented evidence at the trial that the comparable sales utilized by this witness as the basis for his value of appellant's tract were based in fact on sales of real estate which reflected an enhanced value that was due to the government highway project (2 R. 185-188). Appellant testified on his own behalf, and estimated the value of his property before the taking at $32,000, and a present value of $2,000 (2 R. 182).

The jury found the just compensation for the taking to be in the sum of $3,652, and the court entered judgment in this amount (1 R. 94, 104-109). The only specific exception to the court's instruction to the jury made by appellant at the time of trial was the court's failure to instruct the jury with regard to his proposed instruction No. 20, which concerned a statute of the State of Washington providing for compensation for loss of adequate access of business property

abutting a highway (2 R. 215-216). It was only in appellant's motion for new trial that error was alleged in the court's failure to submit his other proposed instructions (1 R. 103).

The appellant now appeals, alleging the court erred in failing to submit to the jury his proposed instructions Nos. 4, 6, 12, 13, 14 and 20 (Br. 3-6).

Additional evidence will be discussed in the Argument, supra.

STATUTE INVOLVED

23 U.S.C. sec. 107(a) provides:

> In any case in which the Secretary is requested by a State to acquire lands or interests in lands (including within the term "interests in lands", the control of access thereto from adjoining lands) required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including the Act of February 26, 1931, 46 Stat. 1421), if--

(1) the Secretary has determined either that the State is unable to acquire necessary lands or interests in lands, or is unable to acquire such lands or interests in lands with sufficient promptness; and

(2) the State has agreed with the Secretary to pay, at such time as may be specified by the Secretary an amount equal to 10 per centum of the costs incurred by the Secretary, in acquiring such lands or interests in lands, or such lesser percentage which represents the State's pro rata share of project costs as determined in accordance with subsection (c) of section 120 of this title.

The authority granted by this section shall also apply to lands and interests in lands received as grants of lands from the United States and owned or held by railroads or other corporations.

SUMMARY OF ARGUMENT

I

The evidence clearly establishes that the reconstruc-

of Secondary State Highway 11-A was just as much a part

e United States project as U.S. Highway 82. The district

properly instructed the jury not to consider the enhance-

in value of appellant's property created by the improvement

condary State Highway 11-A after the United States became

committed to the project. Appellant's proposed instruction directing the jury to consider such "after values" is contrary to well-established law.

II

The district court correctly refused to instruct the jury regarding the statute of the State of Washington because this statute, in that it prescribes a measure of compensation, is a matter of substantive right as distinguished from a procedural mandate, and the law is clear that federal law alone controls here. Appellant's rights were protected in the condemnation proceedings regardless of the state statute.

III

Appellant is not entitled to compensation under the guise of severance damage for business losses because of the change of access to the highway. There was substantial evidence presented at the trial of this case showing that the change of access was adequate and did not affect the fair market value of appellant's remaining tract.

Since appellant's access was not damaged or destroyed, situation is distinguishable from United States v. Grizzard, U.S. 180 (1911), and the other cases quoted by appellant. llant is rather in the exact position depicted by this t in Winn v. United States, 272 F.2d 282 (1959). Just use the access may not be what appellant considers "direct ss" does not by this fact alone entitle him to compensa-. Accordingly, any loss in the business character of the erty as alleged by appellant must be deemed damnum absque ria.

ARGUMENT

I

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY THAT ENHANCEMENT IN VALUE CREATED BY THE UNITED STATES IN CONSTRUCTING THE PROJECT FOR WHICH THE LAND IS TAKEN CANNOT BE CONSIDERED IN DETERMINING ITS JUST COMPENSATION

Appellant contends that the trial court erred in ing to submit his proposed instruction No. 6, which reads ollows (1 R. 70; Br. 3):

> I instruct you that while you may not consider U.S. Highway 82 as contributing to the value of this property you may, however, consider the contribution to value made by State Highway 11A, the Lenox Avenue Overpass and other developments aside from U.S. Highway 82 in arriving at your evaluation of the expert's testimony and in arriving at the award in this case.

It is clear from the record of this case that the reconstruction of Secondary State Highway 11-A became just as much a part of the United States project as U.S. Highway 82. The Secretary of Commerce, acting under the provisions of 23 U.S.C. sec. 107(a) (supra, pp. 10-11), through the Bureau of Public Roads, determined that the described parcels of appellant's land were needed in order to complete the Interstate System (1 R. 6). The declaration of taking (1 R. 7-12) clearly specifies that the described parcels of appellant's tract were taken for public use because of the necessity to provide adequately for construction, reconstruction, and improvement of Washington Highway Project UI-82-2(5), a portion of the national system of Interstate and Defense Highways, being constructed in accordance with standards, including control of access, adopted by the Secretary of Commerce in cooperation with the State Highway Department.

Government witness, Charles Chapman, a project engineer with the State of Washington Highway Department, testified as follows (2 R. 10):

BY MR. HULL:

* * * * *

Q. And do you know when the Federal-State project through here was approved?

A. It was approved on -- in July I believe of 1958.

Q. 1958. Now is the -- there has been some improvement, has there, of the secondary State Highway 11-A which is the continuation from east -- out east toward Moxee and beyond? Is that part of the Federal-State Highway project as well?

3/

A. Yes.

Of course, traffic access to the interstate freeway at limited points is just as much a part of the freeway project as other portions of the road. As the diagram makes obvious, some rearrangement of State Highway 11-A was necessary to complete the interchange.

3/ The court reporter erroneously left this answer out in transcribing the proceedings.

The law is well settled that the value of the land condemned is to be ascertained as of the date of the government taking and that the United States does not pay an enhanced value for condemned property when the enhancement is created by the very project for which the land is needed. Shoemaker v. United States, 147 U.S. 282 (1893); United States v. Miller, 317 U.S. 369 (1943); United States v. Cors, 337 U.S. 325 (1949) United States v. Whitehurst, 337 F.2d 765 (C.A. 4, 1964); J. A. Tobin Construction Company v. United States, 343 F.2d 422 (C.A. 10, 1965). Hence, the trial court did not err by not submittin the instruction because it would be directing the jury to consider any enhancement in value of the property condemned after the Government became committed to the project.

We submit, therefore, that the following instruction that was given by the trial court to the jury was adequate (2 R. 205):

> In arriving at fair market value of the land in question, you must disregard increase in value, if any, due to the initiation of the Federal-State Highway Project 3-A and 11-A, or due to the proximity of the project to the subject lands, arising after the project was approved by the Director of Highways and

authorized by Congress on August 27, 1958, or due directly to the construction of the Federal-State Highway Project 3-A which began July, 1960.

II

THE DISTRICT COURT CORRECTLY REFUSED THE REQUESTED INSTRUCTION ON SUBSTANTIVE STATE LAW

Appellant contends that the trial court erred in submitting its proposed instruction No. 20 (Br. 5, 17), which was based on a statute of the State of Washington, RCW 52.080 (Br. 17). That statute entitled an owner of business property abutting a highway compensation for loss of equate ingress or egress where the highway is altered.

This statute, in that it prescribes a measure of mpensation, is a matter of substantive right, and federal alone controls in the determination thereof. United tes v. Miller, 317 U.S. 369 (1943); United States v. 93.970 es of Land, 360 U.S. 328 (1959); State of Washington v. ted States, 214 F.2d 33 (C.A. 9, 1954), cert. den., 348 U.S. ; United States v. Certain Parcels of Land, Etc., 144 F.2d (C.A. 3, 1944). The Supreme Court made this clear in the ller case, supra, stating at pp. 379-380:

> We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right--such as measure of compensation--grounded upon the Constitution of the United States.

Accordingly, the state statute in question, being one of substantive law as distinguished from a procedural mandate, is completely irrelevant to federal condemnation proceedings.[4/]

Appellant's rights were protected regardless of the state statute. In federal condemnation law, just compensation is determined by the fair market value of the property taken. An actual loss of access, being an element of value arising out of the relation of the part taken to the entire tract, entitles the owner to compensation for such taking. Here, any such loss would be reflected in the before and after values of the property that were derived from comparable sales as

---

4/ As established by Point III of the Argument, infra, the record shows evidence that appellant was not deprived of adequate access. Hence, the provisions of the state statute were not violated.

stablished by the evidence presented. We submit that this atter was correctly before the jury and that the trial court dequately instructed on this issue (2 R. 201-202).[5/]

III

APPELLANT IS NOT ENTITLED TO COMPENSATION UNDER THE GUISE OF SEVERANCE DAMAGE FOR BUSINESS LOSSES BECAUSE OF THE CHANGE OF ACCESS TO THE HIGHWAY

Appellant complains his entire direct access to condary State Highway 11-A was destroyed and taken by these oceedings and that the business character of his property, ich had great potential, was destroyed (Br. 9). The case ils down into one in which the appellant is seeking, under e guise of severance damages, compensation for business sses because of the change of access to the highway. The

---

5/ There was no reversible error committed by the trial court in not giving appellant's proposed instructions Nos. 4, 12, and 14 (Br. 3-5, 13-14). A review of the instructions submitted to the jury (2 R. 200-206) will clearly show that the rial court substantially and adequately covered the above-quested instructions. In reviewing instructions, they must considered as a whole and not piecemeal or by taking excerpts om the remainder. Wendell S. Wilson, et al. v. United States C.A. 10, No. 7867, Sept. 1, 1965), not yet reported. Here, e appellant's requested instructions simply amounted to a petition of what the trial court had already covered, and here is no error in the instructions as given.

question for determination by the jury is the market value of the property to be taken, not the damage to the business of appellant in operating that property. United States v. Ham, 187 F.2d 265, 271 (C.A. 8, 1951). There was substantial evidence presented at the trial of this case establishing that the appellant's access was not damaged or destroyed and that he was afforded adequate access to Secondary State Highway 11-A, and that this change in access did not affect the fair market value of the land. An extract of the record shows:

Government witness Chapman testified as follows (2 R. 24, 26):

> BY MR. HULL:
>
> Q. As constructed now, is it possible for a large vehicle coming off the Bock property to make a turn onto 11-A in either direction?
>
> A. It is.
>
> Q. Is it possible for a large vehicle coming from, say, Yakima to make a turn here and go onto the Bock property?
>
> A. It is.

Q. How large a vehicle?

A. Those radii are designed to contain the movement of trucks and semi-trailers.

* * * * *

Q. [In referring to dimensions of new access] Is that in accordance with State Highway and Federal Highway standards considered an adequate access for large vehicles or normal traffic, and considering that the width at the highway abutment is forty-two feet? Is that considered a reasonable access --

A. Yes, it is.

Q. -- for normal traffic?

A. It is.

Government witness Echles testified as follows

R. 55, 56, 57-58):

BY MR. HULL:

Q. What in your opinion as of the date of taking in June, June 20, 1962, was the highest and best use of the subject property?

A. In my opinion, the best use was the existing use, along with some limited type commercial operation.

* * * * *

Q. Are you familiar also with the fact that access from this property to Highway 11-A has now been limited to the access portion within Tract A, or Part A, and the balance of it is cut off by a fence? Are you familiar with that factor?

A. Yes.

Q. Then subsequent to such taking, what in your opinion remains the highest and best use of this property?

* * * * *

A. I feel it would have much the same uses after the taking as before, that the existing use would not be necessarily changed, * * *.

Government witness Lombard testified as follows (2 R. 105-106):

BY MR. HULL:

Q. And what in your opinion was the highest and best use of that property just before the taking in June, 1962?

A. I would say limited to transit commercial. That is, catering to the traffic along the highway as a produce stand, or something of this nature.

Q. And after the taking in this case, in your opinion, was that best use changed?

A. Not in my opinion, no.

Q. Would you explain your reasoning in that regard?

A. Well, the traffic did not change, has not changed considerably. In fact, the volume of the traffic has possibly increased; the exposure of Mr. Bock's property from oncoming traffic was not altered too much.

Q. What do you mean by exposure?

A. Well, the exposure from oncoming traffic, either from the east or from the west would be about the same so far as cars being able to see it.

Q. I think this is a term used by men in your profession. What does exposure mean?

A. I meant by exposure, the visibility of the property by oncoming cars.

Q. You say that is not altered?

A. No, they would have plenty of time to see Mr. Bock's cars -- or cars would have to see Mr. Bock's property.

Appellant did not offer any competent evidence to

ute the established evidence of adequate access. The case,

refore, is clearly distinguishable from United States v.

zzard, 219 U.S. 180 (1911), and the other cases quoted by

ellant (Br. 10-19) because here there is no loss or damage

to appellant's access which affected the fair market value of the land. His access right was changed, but not damaged or destroyed, as appellant would like us to believe. Just because the access may not be what the appellant considers a "direct access" does not by this fact alone entitle him to compensation. This was clearly pointed out by the Supreme Court in Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), where the Court stated (p. 5):

> * * * loss to the owner of nontransferable values deriving from his unique need for the property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.

Thus, appellant's situation is exactly as the case of Winn v. United States, 272 F.2d 282 (1959), where this Court points out (p. 286): "Appellants have not suffered damage 'arising out of the relation of the part taken to the entire tract.' United States v. Miller, supra." And, as the Court further stated (p. 287):

> There is nothing to show that the Interstate as such will contribute any "direct and identifiable element of depreciation" to the residue of their property. Boyd v. United States, 8 Cir., 1955, 222 F.2d 493, 495. Whatever damage they may suffer results from neither the taking of the land nor the use to which it is to be put, but from the Interstate project as a whole and the consequent diversion of traffic. Construction of a strip of a highway on the land taken here is not such a use as to cause injury to the remainder. Appellants' claim is essentially one for business loss and is not compensable. [Citing cases.]

As in the case at bar, the change in access was not such as to cause injury to the remainder. True, the appellant may have to travel a few hundred feet farther than the old access but, as pointed out in the Winn case, supra, at page 287, such inconvenience is not compensable.

A similar case, Stipe v. United States, 337 F.2d 818 (C.A. 10, 1964), also concerned a change of access to business property abutting a relocated highway, and the court said (at p. 821):

> Although perhaps not as desirable or convenient as it was before, access was provided to the relocated and changed highways. The record as a whole discloses beyond any doubt that the decrease in the value of the business resulted not from the taking of part of Stipe's land, but from the relocation of Highway 69, which diverted traffic over the highway away from the business operation. Whatever his loss, it is due to the destruction or frustration of his business, and not the taking of the property. Such losses are not compensable. [Citing cases.]

Accordingly, any loss in the business character of the property as alleged by the appellant must be deemed to be a claim for business loss under the guise of severance damage. Such loss is not compensable, being what is known as "damnum absque injuria." Omnia Co. v. United States, 261 U.S. 502 (1923); Mitchell v. United States, 267 U.S. 341 (1925); Ralph v. Hazen, 93 F.2d 68 (C.A. D.C. 1937); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

Where a jury returns a verdict in a condemnation case which is within the range of competent testimony, it cannot be said to be against the weight of the evidence. It is not the

unction of a reviewing court to retry the facts and substitute s judgment for that of the jury. United States v. 2,635.04 res of Land, Etc., 336 F.2d 646, 649 (C.A. 6, 1964); Simmonds United States, 199 F.2d 305, 307 (C.A. 9, 1952); United ates v. Hayes, 172 F.2d 677, 680 (C.A. 9, 1949).

CONCLUSION

For the foregoing reasons, it is respectfully sub-tted that the judgment of the district court should be ffirmed.

Respectfully,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

FRANK R. FREEMAN,
United States Attorney,
Yakima, Washington, 98901.

RONALD R. HULL,
Assistant United States Attorney,
Yakima, Washington, 98901.

ROGER P. MARQUIS,
ROBERT M. PERRY,
Attorneys, Department of Justice,
Washington, D. C., 20530.

CTOBER 1965

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation
this brief, I have examined Rules 18 and 19 of the United
tes Court of Appeals for the Ninth Circuit, and that, in
pinion, the foregoing brief is in full compliance with
se rules.

ROBERT M. PERRY,
Attorney, Department of Justice,
Washington, D. C., 20530.